

Employer Status Determination

Bankhead Enterprises, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Bankhead Enterprises, Inc. (BEI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

BEI was formed by a merger on December 22, 1986 of the following companies: 1) Kehely & Company, Inc., 2) Bankhead Asphalt Paving, Inc., 3) All South Supply Company, Inc., 4) Bankhead Railway Welding, Inc., 5) Bankhead Systems and Controls, Inc., and 6) Railtrack Services, Inc.. According to BEI all BEI stock is owned by Glen Taylor.

The business operations of BEI may be generally divided into railroad and non-railroad concerns. The non-railroad operations are conducted by Bankhead Welding Service (general welding), Bankhead Transportation Equipment (automobile carrier trailer manufacture), Bankhead Asphalt Paving (street and parking lot paving), and Bankhead Asphalt Trucking (construction material delivery). BEI had four divisions that have performed, at least in part, or are performing work for a carrier. 1) Bankhead Railway Services, 2) Railtrack Services, 3) Bankhead Maintenance Company, and 4) Bankhead Railway Welding. BEI's principle business is welding and asphalt paving.

Bankhead Railway Services

Bankhead Railway Services, Inc. (BRS) for the period 1985 through 1990 had a contract to run the intermodal operations at the Norfolk Southern Railroad (NSR) Inman yard terminal. The intermodal operations included BRS personnel who performed crane operations, groundmen, truck drivers, mechanics, and clerical functions. A contract dated 9/13/85 between Bankhead Railway Services and Norfolk Southern Railroad includes the following:

- BRS will supply personnel, equipment, parts and supplies for the intermodal facility,
- BRS will provide all paperwork and administrative functions,
- BRS will conduct equipment inspections and track

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maintenance records,

- NSR does not have any authority to directly supervise BRS employees,
- The contract can be terminated by either party with 60 days notice,
- BRS agrees to furnish a detailed accounting of the expenses of operation verified by a Certified Public Accountant at the request of NSR,
- BRS shall require its employees to follow NSR rules while on NSR property,
- BRS agrees to cooperate with NSR for background checks of BRS employees, drug testing, or other investigation at the request of NSR,
- BRS will furnish certified urinalysis testing of BRS employees to NSR prior to their coming onto NSR property,
- NSR can bar any BRS employee from NSR property for various reasons,
- BRS is required to pay minimum wage of at least \$6.50 per hour,
- NSR will pay BRS \$60,000 per month with an extra \$8.47 for each lift in excess of 6,500,

The Bankhead Railway Services employees involved in intermodal operations were found to be employees of Norfolk Southern Railroad for purposes of the Railway Labor Act by the National Mediation Board in 1990 (17 NMB 153) due to the supervision by Norfolk Southern Railroad employees. In-Terminal Services, a non-covered employer (Legal Opinion L-90-159) took over the intermodal operations in 1990.

Bankhead Enterprises, Inc., through Bankhead Railway Services, had a second contract to maintain the welding shop located at Inman Yards. The welding operations involved approximately 20 employees who would weld 80 foot lengths of rail into quarter mile lengths to be loaded on flat cars and transported to other NSR locations. The

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employees glued crossing track and switches together instead of just using bolts. They also did ballast cleaning. A contract dated January 30, 1984, between Bankhead Enterprises, Inc., and Norfolk Southern Railroad includes the following:

- BEI will perform welding and mechanical maintenance work as ordered by NSR,
- BEI will provide all necessary equipment for welding,
- BEI will furnish (1) welder/foreman with truck and (4) welders with trucks for which [BEI] will pay an hourly rate and overtime rate,
- All overtime work must be authorized by NSR in advance,
- All days will be considered work days except for holidays observed by NSR,
- BEI employees must live in the Atlanta area,
- A time clock will be punched daily by BEI workers and verified by an NSR supervisor,
- Time cards and production reports will be furnished to NSR,
- NSR reserves the right to extend the scope of the work covered under the agreement and the contractor must perform the extra work,
- The contract can be terminated by either party with 90 days notice.

Railtrack Services

Railtrack Services, Inc. (RSI) was acquired by Bankhead Enterprises, Inc. through an asset purchase from the former operator in 1986. RSI hired the former employees of the contractor. RSI performs continuous track welding and rail cropping for Consolidated Rail Corporation (Conrail). RSI had approximately 44 employees working at the Harrisburg, Pennsylvania, plant. The contract between RSI and Conrail provides in part:

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- Conrail can terminate the contract on 10 days notice,
- RSI shall work as an independent contractor and be subject to the general oversight of Conrail's Chief Engineer-Maintenance of Way,
- RSI is subject to audit by Conrail,
- RSI agrees to accept responsibility for payment of all employment taxes,
- Conrail has a pre-emptive right to purchase RSI's materials and equipment at fair market value in the event of a sale of RSI,
- For rail cropping services, Conrail agrees to pay actual labor costs plus 10% for overhead, 38% for fringe benefits, including extra pay for overtime,
- Conrail agrees to pay for repair parts, maintenance parts and expendable supplies,
- For rail welding, Conrail agrees to pay \$17.25 for welds made during the first 8 hours of a shift, and \$23.29 for welds made during overtime and weekends,
- For rail welding, RSI will submit invoices weekly, and Conrail will pay as promptly as possible,
- RSI will observe the same holiday schedule as Conrail,
- RSI's work is open to inspection by Conrail inspectors at all times,
- Conrail will lease work locations to RSI for \$1 per year, which are subject to inspection by Conrail inspectors at all times,
- RSI is to submit a daily production report signed by both the plant superintendent and Conrail's Chief Engineer-Maintenance of Way.

Invoices for rail cropping services show that daily time sheets signed by the RSI employees were submitted to Conrail. Invoices for supplies show that RSI bills Conrail for the cost of supplies

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plus ten percent for overhead.

Bankhead Maintenance Company

During the period 1985 through 1990, Bankhead Maintenance Company (BMC), operating as a division of Bankhead Enterprises, Inc., had eight teams of two employees each assigned to eight different cities working on Norfolk Southern Railroad property performing electric welding on track switches. This work was performed by a different contractor prior to BMC obtaining the contract. The contract dated December 15, 1981, between Bankhead Maintenance Company and Norfolk Southern Railroad included the following:

- BMC will perform electric welding on rails, frogs, railroad crossings, switch points, and other track components as designated by NSR's Division Engineer,
- BMC must submit daily reports to include crew identification, hours worked, overtime, work performed, truck odometer reading, signature of NSR representative, and any other information as requested by NSR,
- BMC must provide its own tools,
- NSR will provide a minimum of 50 hours of work per crew per week,
- NSR will pay an hourly wage and overtime wage,
- BMC will observe NSR holidays,
- NSR will reimburse BMC for welding rods, gasoline, and telephone calls,
- BMC will be responsible for meals and lodging, licensing, insurance, maintenance, supplies, and equipment,
- BMC will submit monthly invoices for each gang,
- The agreement is cancelable upon 120 days notice.

Bankhead Railway Welding

Bankhead Railway Welding (BRW), a division of Bankhead Enterprises, Inc., also performed welding and other maintenance work under

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contract with Norfolk Southern Railroad. BEI stated this work was previously performed by a different contractor. An attorney for BEI, stated in a letter dated September 17, 1993, that approximately 10 Bankhead Enterprises, Inc., employees would perform welding and other mechanical maintenance work on railroad support equipment at the Norfolk Southern Railroad rail plant at Inman Yard. The letter stated the employees were working under the name Bankhead Welding Service, however, a review of the invoices for the period states the name as Bankhead Railway Welding. A review of BRW invoices indicates that BRW performed the following work for Norfolk Southern Railroad:

| <u>DATE</u> | <u>INVOICE</u> | <u>AMOUNT</u> | <u>DESCRIPTION</u> |
|-------------|----------------|---------------|---|
| 11/26/86 | 1610 | \$12,817.47 | Bonding joint for the month of October. |
| 11/14/86 | 1614 | 2,883.29 | Repairs to a crossing in BEI's shop. |
| 11/19/86 | 1616 | 26,674.91 | B a l l a s t cleaning for October, less cooks. |
| 12/23/86 | 1647 | 8,514.68 | T h e r m i t e welding for November. |
| 12/23/86 | 1666 | 10,096.06 | L o a d i n g , unloading, warehousing, and railroad supervision. |

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any express company, sleeping-car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(ii) any company which is directly or indirectly

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owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Bankhead Enterprises, Inc. clearly is not a carrier by rail. There is no evidence that BEI is controlled by a carrier or by individuals who control a carrier. Rather, the available evidence indicates that it is not under common ownership with any rail carrier. Therefore, BEI is not a covered employer under the Acts.

This conclusion leaves open, however, the question of whether the persons who perform work for BEI and its divisions under its arrangements with rail carriers should be considered to be employees of those railroads rather than of BEI. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the definition under paragraph (A) is whether the

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individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also in the way he performs such work.

As noted earlier, the NLRB/NMB found the employees of Bankhead Railway Services to be covered under the Railway Labor Act. The bargaining unit at issue in the NLRB/NMB proceedings included individuals performing intermodal freight handling at Gate 6 in the Inman Yard Terminal of the Norfolk Southern in Atlanta, Georgia, under contract with Bankhead Railway Services. Bankhead Railway Services characterized the employees working at Gate 6 as crane operators, ground men, truck drivers, equipment mechanics, clerks, shift supervisors, and division manager. All individuals performing these services were on BRS's payroll. Norfolk Southern supplied overhead cranes and all other equipment at this location, excluding pickup trucks used to tow truck trailers on and off flat cars. Work was assigned by BRS's five shift supervisors on site without reference to BRS headquarters. Individuals working under the contract were required to comply with Norfolk Southern's rules.

Norfolk Southern (NSR) refutes the NLRB/NMB finding and points out that pursuant to the contract referenced above, Bankhead Railway Services agreed to furnish various vehicles and equipment; to perform loading and unloading of containers and trailers; to undertake certain equipment inspection and repair; and to perform all necessary paperwork and administrative functions.

Norfolk Southern Railroad denies the statement by Bankhead Railway Services to the National Mediation Board that the railroad had any control over the rate of pay of the individuals performing service under the contract, stating that BRS hired, trained and discharged the individuals providing the service under the contract, and set the individuals' wages and fringe benefits. Norfolk Southern Railroad also denied that it could require Bankhead to discharge an employee, stating that it could only exclude an unsatisfactory individual from NSR property. In addition, NSR states that its supervisory employees did not communicate with individuals performing the contract service, but rather directed the result of the service by informing the supervising Bankhead employee of defects to be rectified. Finally, NSR states that following termination of the contract with Bankhead Railway Services, NSR contracted with In-Terminal Services for the operation of the Inman

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yard.¹

Based on the evidence before it, the NMB concluded that "Norfolk Southern exercises a significant degree of control over the BRS division of BEI." 17 NMB at 158. The evidence on some issues of fact is inconclusive. Both Bankhead Railway Services and the railroad furnished tools and equipment. BRS had direct control of the manner of performance through first level supervision, while Norfolk retained a more remote control at a higher level. However, other evidence points strongly to the conclusion that the individuals were controlled by BRS. BRS controlled wages and hours and whether the individuals were assigned to the Inman Yard or another location. Moreover, that Norfolk terminated the contract in favor of another firm, previously determined not to be engaged in providing service covered under the Acts, indicates that BRS performed an independent trade, and that the contract was entered at arms length.

On these facts, case law supports a finding that the individuals in question were not railroad employees. In two cases decided in 1948, the Eighth Circuit Court of Appeals found that contractors who transferred shipments from damaged freight cars in railroad yards were not employees of the respective railroads under language of the Railroad Retirement Tax Act substantially identical to present paragraph (A). See Reynolds v. Northern Pacific Railway, 168 F. 2d 934; and Reynolds v. Chicago, St. Paul, Minneapolis & Omaha Railway, 168 F. 2d 943.

Moreover, courts deciding cases under the Federal Employers' Liability Act (FELA) have held individuals loading and unloading trucks in rail yards under contract to be employees of the contractor rather than the railroad. Because FELA defines the term "employee" in much the same way as the Railroad Retirement Act, an employee, cases under FELA are useful in interpreting paragraph (A) of the Railroad Retirement Act. Thus, in Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (W.D. La. 1965), affirmed, 347 F. 2d 233 (5th Cir. 1965), an employee of a truck company affiliated with the railroad was killed on railroad

¹ In-Terminal Services is a division of Mi-Jack Products Incorporated. In Legal Opinion L-90-159, the Deputy General Counsel determined that In-Terminal Services was not a covered employer, and that work performed by In-Terminal on railroad property was not covered employee service under the Acts.

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property while loading truck trailers on a rail car. The court found that where no railroad employee was present when the injury occurred, and where the individual was not on the railroad payroll and was not subject to discharge by the railroad, the railroad did not control the employees of the truck company. Similarly, in Williams v. Chicago & Eastern Illinois Railroad, 300 N.E. 2d 766 (Ill. App., 1973), an individual driving a tractor used to pull truck trailers on and off rail cars was not the railroad's employee under the FELA where he did not work with or under supervision of the railroad's employees was hired and paid by the contracting firm, and used the contractor's tractor on the railroad's property. See also, Turpin v. Chicago, Burlington & Quincy Railroad Co., 403 S.W. 2d 233 (Mo, 1966), cert. den. 384 U.S. 1003 (1966); and Kelley v. Southern Pacific Co., 419 U.S. 318 (1974).

The terminal freight service performed by Bankhead Railway Services in the Inman Yard is indistinguishable from that described in the Fawcett and Williams cases. Moreover, transfer of loaded containers is similar to transfer of the freight itself performed by the contractor in the Northern Pacific Railway and Chicago, St. Paul, Minneapolis & Omaha Railway cases under the Railroad Retirement Tax Act.

Accordingly, the control test in paragraph (A) is not met.

The definitions set forth under paragraphs (B) and (C), which are broader than that contained in paragraph (A), do not apply to employees of independent contractors performing services for a railroad if the contractors are engaged in an independent trade or business. Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). This Eighth Circuit decision has been consistently followed by the Board for over forty years.

Thus, under Kelm the question remaining to be answered is whether Bankhead Railway Services is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized trade;

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e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968, at 341.

It is apparent that Bankhead Railway Services is independently capitalized, and is engaged in a recognized trade or business; accordingly, it is the opinion of the Board that BRS is an independent business.

Because BRS engages in an independent business Kelm would prevent applying paragraphs (B) and C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that service performed by employees of Bankhead Railway Services is not covered under the Acts.

The other contracts described in this decision do not differ significantly from the Bankhead Railway Services contract analyzed above. Therefore, the Board finds that employees of BRS performing welding services under contract with Norfolk Southern Railroad, employees of Railtrack Services, Inc. performing welding services under contract with Conrail, and employees of Bankhead Maintenance Company and Bankhead Railway Welding performing services for carriers under contracts are not covered under the Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

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C. 2188-94

TO: The Board

FROM: General Counsel

SUBJECT: Coverage Determination
Bankhead Enterprises, Inc.

I attach a proposed Board decision regarding the coverage of Bankhead Enterprises, Incorporated.

This case was submitted to the Board previously.

On June 9, 1993, a majority of the Board remanded the case to the Chief of Audit and Compliance for further investigation of whether the services involved constituted covered employment. On September 14, 1994, the Chief Financial Officer submitted to me the results of that investigation.

The proposed decision incorporates large portions of the Chief Financial Officer's report.

Catherine C. Cook

Attachment

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6 companies that merged to form BEI:

Kehely & Company, Inc.

Bankhead Asphalt Paving, Inc.

All South Supply Company, Inc.

Bankhead Railway Welding, Inc.

Bankhead Systems and Controls, Inc.

Railtrack Services, Inc.

Non-rr operations:

Bankhead Welding Service

Bankhead Transportation Equipment

Bankhead Asphalt Paving

Bankhead Asphalt Trucking

RR operations:

Bankhead Maintenance, Inc.

Railtrack Services, Inc.

Bankhead Railway Services

Bankhead Railway Welding

30 September 1994

Steve, Tom -

1) The named units are variously referred to in the audits & elsewhere as "subsidiaries" & as "divisions." Their status is ambiguous & for purposes of the decision they are treated as part of one enterprise, BEI. Since BEI is being held not covered because there is no common control, the corporate status of these entities does not make any difference. In regard to the only significant issue in this case is the coverage of service performed by individuals, the corporate status of these entities really does not make any difference.

2) I have altered the last paragraph slightly. The reference on page 7 to NSR paying "an hourly and overtime wage" I think is merely careless language by the auditors & refers to the same type of transaction characterized elsewhere as the railroad being responsible for labor costs plus a percentage.

M
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L